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In the Supreme Court of the United States

JANUARY TERM, 1974

THOMAS E. JOYCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TO: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

Petitioner, Thomas E. Joyce, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit insofar as said opinion affirmed his conviction and sentence.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *Thomas E. Joyce, et al.*, Nos. 73-1014, 73-1015, 73-1016 was entered on May 9, 1974, but is not yet officially reported. It is printed in the Appendix to this Petition. (App. 18)[1] The Opinions of the Trial Court are not yet officially reported, but are printed in the Appendix to this Petition. (App. 1-17)

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was filed on May 9, 1974. (App. 18) A timely Petition for Rehearing was denied on May 28, 1974. (App. 47) This petition is filed within thirty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *United States* v. *Marion*, 404 U.S. 307, create a rule that the unnecessary delay provisions of Rule 48(b) of the Federal Rules of Criminal Procedure impose upon the defendant the onus of demonstrating the delay was unnecessary and that specific prejudice followed therefrom?

2. What is the standard of proof required to support federal jurisdiction under the Mail Fraud statute? Specifically, will an inference that a letter was sent from outside the venue area to an address shown support a second inference it was received at that address, as charged

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[1] "App. ...." denotes Appendix to the Petition.

(Count 1), especially when venue relies on that inference piled on inference? Is it sufficient that a letter recites a carbon copy was to go to a named individual, without an address (Count 8) to support an inference it was mailed, and received by mail at Petitioner's residence address in the vicinage as charged in the indictment? Does testimony that a letter was "in all probability mailed" (Count 15) satisfy proof beyond reasonable doubt?

3. Does the recognition by the whole panel that the nexus between the Count letters on Counts 1 and 8 and the scheme can only be attained by tortuous reasoning on the Government's part, contradict the Supreme Court's delimitation of the application of the mail fraud statute that it be used only in "those limited instances in which the use of the mails is a part of the execution of the scheme to defraud"? *Kann* v. *United States,* 323 U.S. 88 at 95.

4. Whether the proof on Count I, wherein the count letter's nexus to the alleged scheme—that Joyce would anticipate he would be notified of a dollar's monthly charge for a duplicate bank statement and the drawing of a $2,300.00 check on the bank thereafter to American Express—which rationale was formulated after trial by the Trial Judge, never considered nor noticed by the Petitioner nor the Government during the trial, never argued by either party, deprives the Petitioner of due process of law.

5. When a person, not a co-conspirator, recites a consent or agency in the Count letter (Count 8) and neither that person nor any one else having knowledge of the making of the document testifies, has the Petitioner been deprived of his right of cross-examination?

6. Can the sending by an alleged victim of a letter to verify the representations (Counts 10 and 11) be considered a furtherance of a scheme to defraud? Did this letter not "increase the probability that the respondent would be detected and apprehended," (*United States* v. *Maze*, 94 S.Ct. 645)?

7. Whether the same letter (Counts 10 and 11) can be the basis of two mail fraud convictions sustaining separate punishment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment—Constitution of the United States

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment—Constitution of the United States

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, Section 1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the decision thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, § 6(j) (11), 84 Stat. 778.

STATEMENT OF THE CASE.

This case originated by the filing of an indictment in fifteen counts on May 27, 1971, (Doc. 2) [2] charging in each said count a violation of Title 18, U.S.C. §1341, commonly known as the mail fraud statute.

In Count One thereof the alleged scheme is set forth, naming this Petitioner and three co-defendants, one Burton Sherre, Harry Wallace, and Robert L. Ostrander as co-defendants in each of said counts.

Ostrander pleaded guilty to Count XIV (a count later dismissed as to all other defendants). All other counts were dismissed as to him.

The scheme, in effect, charges that the victims were persons engaged in the business of placing insurance risks, "insurance brokers and agents", including Bert N. Carvalho, Jr.; Thomas H. Paterson; E. Price Littlejohn; Carvalho and Company, Inc.; E. P. Littlejohn & Co.; International Excess Agency, Inc.; Fred Pearson; and Aviation and Reinsurance Corporation of America. Also numbered among the "victims" are certain state insurance agencies, and purchasers.

The scheme and artifice to defraud is alleged as constituting the formation of Global Surplus and Excess Limited, a Bahaman Company, having the purpose of carrying on an insurance business; that a part of the scheme involved the entering into a trust agreement between Global and the Cosmopolitan National Bank of Chicago under Trust Number 15385, which it is alleged the defendants represented was established for the protection and benefit of those insured by Global; that, con-

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[2] "Doc." and "A" refer to the Trial Court record. "App." refers to the Appendix attached to this Petition.

tinuing the alleged scheme, a power of attorney agreement was entered into by the defendants appointing Burton Sherre, as Attorney in Fact for the above Trust, giving Sherre power of direction over said trust to act for and on behalf of those insured by Global; that the defendants conveyed into the Trust certain real estate, which they represented to be assets of Global, for the protection and benefit of those so insured; that, furthering the scheme, copies of the Trust Agreement were generally circulated to induce the placement of insurance by agents and State Insurance Agencies for the purpose of inducing said agencies to permit "insurance brokers and agents" to place insurance risks with Global; that, further, the scheme is alleged to have included the preparation of letters of appraisal of such real estate with an assigned value in excess of the true value, with a circulation of such letters of approval to the agents and brokers and to the State Insurance Agencies to induce, and to permit the placing of the insurance risks with Global; that as part of the scheme and artifice, it is alleged that the defendants omitted to advise the brokers, agents, and State Insurance Agencies that some of the real estate conveyed into the Trust was mortgaged "in amounts equal to or in excess of the true value of the real estate"; that, further, Global was caused by the defendants to be incorporated in Illinois; that Global was represented as a holding company for the real estate in Trust Number 15385, and a final representation that Global Surplus and Excess Limited of Illinois was a wholly owned subsidiary of Global Surplus and Excess Limited; that the defendants circulated balance sheets and financial statements relative to the financial condition of Global which were false and that they represented that funds deposited at various banks would be for the protec-

tion and benefit of policyholders and assureds of Global, which the defendants would and did convert to their own use.

On July 30, 1971, this petitioner moved to dismiss the indictment on the grounds of delay in prosecution, and prejudice to him occasioned by such delay, including the death of witnesses since July, 1968, before which July 1968 Grand Jury this petitioner was subpoenaed for presentation of corporate documents. Other motions including a motion for severance from the co-defendant Wallace were also submitted.

On March 6, 1972, all defendants, including this petitioner, moved again to dismiss for want of speedy trial (Doc. 28-29), which motion was also denied.

The cause was brought on for trial on June 15, 1972, and continued from day to day thereafter until June 30, 1972. Except for Count Two (dismissed by the Government) and Count Fourteen (dismissed by the Court at the conclusion of all the evidence), this petitioner was found guilty on all counts.

As the defense was about to begin, this petitioner became seriously ill requiring hospitalization. He did not attend for the defense, argument, instructions, nor verdict. Because of his illness, he asked for, and secured, additional time to file post-trial motions. Some confusion ensued, and his Notice of Appeal was filed before the trial judge had opportunity to rule upon them. The Court of Appeals allowed a limited remand to afford that opportunity. On the limited remand, petitioner was granted acquittal on Counts 3 through 7 and 12 and 14, generally on the basis of failure of proof of mail use as charged. Thereafter, petitioner's co-defendants requested remand to secure the

advantage of that trial court determination, which they received—plus a finding and acquittal by the trial judge that mailing had not been proved on Count 8. This petitioner sought the same ruling on his conviction on Count 8, which the trial judge declined on the basis that the limited remand order had been executed, and jurisdiction over petitioner had re-vested in the Court of Appeals.

On review the Court of Appeals affirmed Count 1 (all judges critical of the extent to which the prosecution had extended the mail fraud statute); Count 8 (one judge dissenting, and the affirming judges extending the same criticism as made to Count 1); Count 9; Counts 10 and 11 (all judges critical of the multiplication of punishment on the basis of a remailing of the same Count letter); and Count 15. Conviction on Count 13 was reversed.

STATEMENT OF FACTS

The proof of the scheme charged will not be extended. This petitioner concedes that the No. 2 representation in the Global financial statement (App. 20) was probably an overstatement of value, and that the account at the Industrial Valley Bank and Trust Company (see Count I *infra*) was used for expenses as well as being maintained as a loss reserve for policyholders. However, it is appropriate to point out that no claims were unpaid. In fact, defense counsel challenged the Government to present one policyholder that had lost money (Tr. 1474-5) and it did not, and could not.

Count I

The Count relates to an account of Global at the Industrial Valley Bank and Trust Co., Jenkinstown, Pennsylvania (Tr. 556-559). An original communication (G. Ex. 114-B, not a Count letter) was a request of this petitioner that he receive a copy of the bank statement on

the Global account. The Count letter (G.Ex. 114-C) is a carbon copy of a document which reads as follows:

"June 9, 1966
Mr. Thomas J[illegible]e
7019 W. Higg[illegible]s Ave.
Chicago, Ill. 60656

RE: Request for Duplicate
Statement
Global Surplus & Excess Ltd.

Dear Mr. Joyce:

Your request will be complied with and you will begin to receive a copy of the statement each month beginning with the May statement until further notice from you. There will be a maintenance fee of $1.00 per month for this service.

I am very happy to be of service in this matter. We appreciate your business and are always available to you with our full and many banking services.

Sincerely yours,

W. Kenneth Clark"

The Court witness-signatory testified that in the ordinary course of business the letter would have been put in the mail in Pennsylvania. There was no other witness, and, accordingly, no proof of receipt.

On motion for judgment of acquittal after trial, the Court ruled:

"The Count I letter (Ex. 114-C) is from an official of a bank, which held an account for Global, advising Joyce that the bank would honor his request for copies of the monthly statements. The government argues that the jury could have found that the mailing of the count letter was in furtherance of the scheme of Joyce and the other defendants to with-

draw and convert funds from the account even though they had represented that it was to be held as a reserve to pay losses. Although the copies of checks drawn on the account (Ex. 116) are almost entirely illegible, the Court has found one such check drawn on the account by Joyce to the American Express Company subsequent to the date of the Count I letter. A reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account." (Memorandum Opinion and Order of June 1, App. 13-14.)

No questions were asked about the American Express check on trial, neither of its making, its purpose, the beneficiary or whatever it paid for. Neither was its value as evidence argued, nor in fact noticed, by either side.

The Court of Appeals upheld the mailing, petitioner's causing the mailing, and furtherance of the scheme through the letter as follows:

"As to the proof of mailing of this count letter, witness Clark testified that he dictated the letter and that his secretary's practice was to send out all dictated letters (other than interoffice correspondence) by mail. Testimony as to office practice is sufficient proof of mailing.

* * *

"... [t]he letter was more than a mere acknowledgment; it also informed Joyce that there would be a $1 per month fee for the service he requested. It was foreseeable that there would be a charge, and that the bank would not impose the charge without an explanation. Joyce could thus foresee that his request would cause the mailing of a letter advising him of the fee, and this is sufficient.

* * *

"The Government has argued that the letter furthered the scheme because it was essential for Joyce to keep track of the balance in the account so that he and other defendants could withdraw funds from the account for their own use, although they represented that it was to be a reserve to pay losses. Since the district court found that Joyce had drawn a $2,359.65 check on the account payable to American Express, it concluded that 'a reasonable mind could thus have fairly found beyond a reasonable doubt that the count letter was incident to an essential element of the conversion scheme—knowledge of the balance in the account.' We agree that the trier of fact could have drawn the inference that the American Express check was not drawn to pay a policyholder's claim." (App. 24, 23)

The Chief Judge, while not dissenting on this Count, expressed his disapproval, in which the other members of the panel joined:

"In my opinion, the Government has stretched to the breaking point the mail fraud statute by using as the count letter in Count 1 the acknowledgment from W. Kenneth Clark of the Industrial Valley Bank and Trust Company, Philadelphia, of Joyce's request for a monthly bank statement of the Global account. The acknowledgment letter was only tangentially related to the fraudulent scheme. I believe the intent of the statute would be better served by using mailings that have something more than a strained relation to the scheme, and not a miscellaneous, random piece of correspondence that requires tortuous reasoning on the Government's part to sustain the conviction." (App. 46)

Count VIII

The Count 8 letter is a covering letter by one Robert D. Meyers to one Carl Brown purporting to forward a Global

financial statement from Cleveland, Ohio to St. Louis, Missouri. Thus, in pertinent part, it reads: "With the consent of Mr. Thomas Joyce we are enclosing the only copy we have of Global's statement. . . . Hoping this will be of value to you in getting Global approved in your state." The face of the letter noted "cc: Mr. Thomas Joyce." (Government Exhibit 29) The evidence of "mailing" is non-existent.

> "A. (Paterson) . . . I then turned over the document referred to to Mr. Meyers and told him to send it out.
> "Q. Did you tell him how to send it?
>
> * * *
>
> "Q. Did you tell Mr. Meyers how to send that document?
> "A. I don't believe I did.
>
> * * *
>
> "Q. Was there a usual procedure that he would follow if you told him to send that letter?
> "A. Yes.
> "Q. What would that usual procedure be?
>
> * * *
>
> "The Witness: He would put it on the mail table and the girl would put it in an envelope and stamp it and send it out." (Tr. 845-7)

But even this paltry evidence is later completely undermined. Paterson did not turn the document over to Meyers because he didn't compose the letter; didn't even know if he was in Cleveland on the day of the letter (Tr. 967).

On remand granted on this case, this defendant asked the Count be dismissed for failure of proof of mailing and venue. The motion as to this Count was denied (Supp. C.L. Doc. 12 and 20).

Later, the co-defendants secured a remand and prayed the same relief. It was granted, the Court holding in pertinent part:

> "Count 8 alleges that defendants caused a letter to be mailed from Cleveland, Ohio, to defendant Joyce in this district. No such letter was ever offered in evidence. Instead, the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation "cc: Mr. Thomas Joyce." This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce. Without such an inference, a reasonable mind could not fairly conclude that the evidence showed the essential element of mailing beyond a reasonable doubt." (Supp. C.L. 31)

The co-defendants were acquitted on the Eighth Count on the basis of their post-trial motion, on the reasoning and conclusion of the Court as set forth above. This defendant asked for equal consideration, since mailing proof having failed as to them, it must also fail as to him. The trial court determined that it had already acted on the limited remand as to Mr. Joyce, and that it was, thus, unable to grant the relief because of loss of jurisdiction.

The majority of the Court of Appeals panel, however, found proof of mailing:

> "The trial court granted Sherre's and Wallace's post-trial motions for acquittal on count 8, stating; "the government merely proved the mailing of a letter from Cleveland to St. Louis, Missouri, which bore the notation 'cc: Mr. Thomas Joyce.' This is not a sufficient basis for a reasonable inference that a copy was mailed to Joyce. We disagree, for the witness Paterson testified that the notation meant a carbon copy was directed to Joyce, and that the customary procedure was to place such a copy in a separate pile

of mail going to Joyce or Global, and then to mail the pile in one envelope. That was sufficient." (App. 27-28)

The dissent, however, would have upheld the Trial Court's evaluation:

> "The Government unsuccessfully attempted to establish proof of mailing through the testimony of Tom Paterson who directed a subordinate to draft the letter and enclose a financial statement of Global. While Paterson testified to the customary procedures for mailing letters and copies in his office, it is significant that he did not personally prepare the letter and that he did not know whether he was in his office on the date shown on the letter. In this posture, Paterson could not say that a copy of the letter was ever mailed or received by Joyce in Chicago. No other testimony was offered by the Government to establish proof of mailing. The notation in the count letter "cc: Mr. Thomas Joyce" standing by itself is an insufficient basis from which to conclude that a copy was mailed to Joyce. Accordingly, the conclusion is inevitable that even when the evidence is viewed in a light most favorable to the Government, the record will not support a reasonable inference that a copy of the letter was sent to Joyce." (App. 44)

The dissenting judge also found unfairness in finding this petitioner guilty where all co-defendants were acquitted.

Counts X and XI

Count X concerned an inquiry made of the Cosmopolitan National Bank as to the condition of the trust established by Global. Count XI is the forwarding of that letter by Cosmopolitan to Global. Though both Counts were affirmed, the dissenting Judge spoke critically of this multiplication of Counts:

"The foregoing observation [of stretching the mail fraud statute to the breaking point] is equally applicable to Counts 10 and 11 where the count letter in Count 10 becomes the underlying basis for Count 11 since the latter count dealt with merely a forwarding of a photostatic copy of the Count 10 letter from the original addressee, Cosmopolitan National Bank, to Global. If the copy of the original letter had been forwarded several times through the mail, presumably the Government would have been able to indict for each separate mailing. It seems to me the prosecutor has a responsibility to exercise restraint and should not approve indictments on essentially irrelevant or duplicative mailings in order to increase the number of counts." (App. 46)

The majority agreed with the observation. (App. 41-42)

Count XV

The only facts necessary for consideration of this Count is the proof of mailing:

"Q. I will show you what has been marked as Government's Exhibit 73 in evidence. This is a letter I believe there has been testimony sent by you to Mr. Littlejohn.

"A. That is my signature, sir. I presume if Mr. Littlejohn produced it to you, that I in all probability mailed it.

"Q. You in all probability mailed it?

"A. I in all probability mailed it to him, yes, sir.

"Q. On February 28, 1968 did you hand-deliver it to Mr. Littlejohn?

"A. No, I did not, sir." (Tr. 1523).

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case on the following grounds:

1. Rule 48(b) speaks of unnecessary delay in presenting a case to a grand jury or in bringing a defendant to trial authorizing dismissal of the indictment. The Court of Appeals for the Seventh Circuit has ruled in this case that this Court's decision in the *Marion* case *(United States* v. *Marion,* 404 U.S. 307) "clearly implies that the limitations period is the only protection against delay [before indictment] unless specific prejudice is shown [by the defendant]." This imposition of the burden of demonstrating prejudice upon the defendant though the clear reading of the Rule [48(b)] puts the burden on the government to demonstrate the delay was necessary. This important question where the defendant is obliged to make a showing of intentional delay plus demonstrative prejudice would nullify the apparent intent of the Rule. The question of whether *Marion* was intended to modify the Rule is a question which has not been, but should be, decided by this Court.

2. This case presents a unique question of federal law that has never been—but should be—ruled upon by this Court, which is whether the venue allegations of an indictment (Counts 1 and 8) and the Sixth Amendment declaration that trials be had within the vicinage where the charged crime occurred can be satisfied by a presumption of fact that a letter inferredly mailed has inferredly been

received, which is without support in the law nor declared by Act of Congress. It presents a correlative question of whether the jurisdiction element of mailing can rest exclusively on a probability.

3. The Court of Appeals unanimously recognized that the Count I mailing—the only Count upon which a jail sentence was imposed—"was only tangentially related to the fraudulent scheme," having but a "strained relation" to it devised by "tortuous reasoning on the government's part to sustain the conviction." Affirmance of conviction with such understanding of the evidence is in conflict with decisions of this Court, as well as all other courts, which recognizes the purpose of the Mail Fraud Statute (18 U.S.C. §1341) is to protect against the use of the mails, "for the purpose of executing" the scheme.

4. It is a fundamental of civil law that a cause tried on one theory cannot be affirmed on another. *Hormel* v. *Helvering*, 312 U.S. 552, 556. Clearly no less can be required in a criminal trial where liberty is in the balance. This Court's supervisory power is appropriate in this case where the theory on which conviction rests was not considered until after trial, the jury excused, and the opportunity to defend gone.

5. The decision on Count 8 goes beyond the theory of vicarious liability among co-defendants, which allows the imputation of agency—as in conspiracy—to redound to the detriment of the parties to the unlawful enterprise. Here an independent party's representation of an agency in a document (which statement was never qualified nor explained nor was the author called on as a witness) is the basis for the sustaining of the essential element of causing to be mailed in furtherance of the scheme. Prolix indictments, with multiple counts have become a dragnet

which do not allow the triers of fact and triers of law neither time nor capacity for individual consideration.

6. The Counts 10 and 11 letters are actually one inquiry to validate or invalidate the alleged false representations made to an alleged victim. The inquiry increased the probability that the scheme would be detected and the perpetrator apprehended. Calling this a letter in furtherance of the scheme is in direct conflict with this Court's decision in *United States* v. *Maze*, 94 S. Ct. 645.

7. The mere forwarding of a count letter (Count X and XI) is a multiplication of offenses based on one transaction. The fact of separate punishment on each count demonstrates a piercing violation of the double jeopardy clause.

The aforestated Reasons for Granting the Writ are more factually expanded hereinbelow.

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1. On July 2, 1968, this petitioner was called before the July 1968 Grand Jury to testify about the matters here in issue. (Tr. 23-24) It was obvious then that the company with which he was associated was being investigated and that he was a target and potential defendant. However, that July 1968 Grand Jury was dismissed in December of that year without the return of an indictment. It was not until May 27, 1971, a matter of thirty-four (34) months later, that this indictment was returned, all charges relative to the matters that were investigated almost three years before for Grand Jury presentation with this petitioner's awareness of that Grand Jury investigation. On July 30, 1971, this petitioner moved to dismiss the indictment for want of a speedy trial as being violative of, not only the Sixth Amendment to the Constitution of the United States, but also Rule 48(b) of the Federal Rules of Criminal Procedure.

Excusing this delay, the Court of Appeals held:

> "The only specific complaint is that two witnesses died. The first, a Mr. Black, would allegedly testify that he filed Global's financial statement with the Pennsylvania Insurance Department, even though Joyce told him not to file it because it was erroneous. Since Global did business in Pennsylvania, defendants had to know that papers had been filed with the Pennsylvania Insurance Department, and they could have shown any attempts to correct Black's misstatements by cross-examining the witness from the Department." (App. 33-34)

The Court continued:

> "Nor is there any showing of intentional delay by the Government. The voluminous transcript and exhibits show that this scheme was a complex one that must have required a lengthy investigation." (App. 34)

We submit to the Court that a voluminous transcript and exhibits do not necessarily impute a necessity to attenuate. Watergate [3] is complex and voluminous and many defendants are already disposed of. A voluminous record does not necessarily import a complex case, and this was *not* a complex case.

We submit to the Court that it should not be enough for the government to satisfy the prohibition of Rule 48(b) to imply it had a complicated scheme, for a burden to devolve on the defendant to show not only an intentional delay by the Government (a burden no defendant can successfully demonstrate) plus a demonstrable, and irrefutable showing of personal prejudice.

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[3] We do not intend to launch into a Watergate discussion neither pro nor con. We use the demonstration only because of its wide publicity and the general public knowledge.

If this decision of the Seventh Circuit is allowed to stand, Rule 8(b) is successfully annulled.

A summary of the facts indicative of the government's conduct follows:

(a) Subpoenaing petitioner before the July, 1968 Grand Jury, wherein he appeared, produced records and testified;

(b) Dimissal of said July, 1968 Grand Jury in December, 1968 without return of an indictment.

(c) Lapse of about 23 months without any action by the government, and a lapse of about 30 months since dismissal of the 1968, Grand Jury, until the return of this indictment on May 27, 1971.

Said conduct is further exemplified by the actions of the government after the indictment:

(a) The government did not file its answer to petitioner's original motions until on or about November 22, 1971, even though it had been ordered to make such answer by August 10, 1971, without asking the court or defendants for an extension of time to answer.

(b) On November 19, 1971 with all parties present the court (Judge Marovitz) set the case definitely for trial for Monday, January 31, 1972, (Tr. Nov. 19, 1971, p. 7) further reiterated that said cause would go to trial on said January 31 (Tr. Nov. 19, 1971, p. 10), and would not be continued (Tr. Nov. 19, 1971, p. 11).

(c) On December 21, 1971, Judge Marovitz reminded the parties that the case would go to trial on January 31 (Tr. Dec. 21, 1971, pp. 3 and 15), after being advised that defendants wanted an expeditious trial.

(d) On January 12, 1972, Judge Marovitz upon motion made by the government to reset the trial date, and set the trial for March, 1972 (Tr. Jan. 12, 1972, p. 4), after being advised by this petitioner that he did

not need or want a continuance (Tr. Jan. 12, 1972, pp. 3 and 7)

(e) The government attorney was ordered by the court to contact the defendants to discuss the matter regarding stipulations, after being advised that the government failed to do so before (Tr. Jan. 12, 1972, pp. 4, 6, 7 and 8) and the matter was set down for status report for February 4, 1972.

At which time the following colloquy occurred:

"The Court: * * * We have a problem with you, not with them. They have come in. They are ready. There are two lawyers. Are you a lawyer, Mr. Joyce?

"Mr. Joyce: I am a lawyer, Judge, and I have tried many cases and I can act as my own lawyer if I have to and I am ready.

"The Court: Is Mr. Sherre a lawyer?

"Mr. Joyce: Yes, he is, too.

"The Court: And who represents Sherre?

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"Mr. Joyce: Mr. Murtaugh has filed his appearance. He is ready to try it. He told me that yesterday. I have talked to Mr. Echeles and the chances are Mr. Echeles will represent me, and Murtaugh will represent Sherre. But at any rate we are not asking for any continuance and never have in this case. This matter came up for three years previously before the Grand Jury and I had the same problem with the Postal Inspectors, continuances and continuances.

"The Court: These men are members of the bar and they are entitled to have an early trial, and if this case is not tried, I will do something about it on March 6th. And in the interim, and don't wait until March 5th to contact them." (Tr. Jan. 12, 1972, p. 4-6)

(f) On February 4, 1972, Judge McLaren was advised that the government made no attempt to contact defendants concerning these stipulations (Tr. Feb. 4, 1972, pp. 2 and 4); further, defendant advised the

court that he was ready for trial (Tr. Feb. 4, 1972, p. 3). Accordingly, it was stated by the court that the matter is slated for trial in March (Tr. Feb. 4, 1972, p. 5). (See order of court.)

(g) On March 8, 1972, Judge McLaren was advised that defendants were ready for trial (Tr. March 6, 1972, p. 3); that then the clerk of the court advised the court that Assistant U.S. Atty. Lydon called him (the clerk) and said this case would be set over sometime in May, and that he (Mr. Lydon) would notify all parties (Tr. March 6, 1972, p. 3); but that neither Mr. Lydon nor anyone from the government notified the defendants that the case would be continued.

2. In neither of these counts, 1 and 8, was there any proof adduced as to receipt, though both counts alleged the receipt by this petitioner of the count letters. It is on the allegation of receipt of the mail that venue rested. It is on the allegation of receipt of the mail that the Sixth Amendment assurance of trial within the vicinage of the crime charged was to be had.

The Count One letter was a file copy of the bank's communication addressed to this petitioner at 7019 West Higgins Avenue, Chicago, Illinois. The witness testified that he dictated the letter and that his secretary's practice was to send out all dictated letters by mail. Of course that letter was mailed in Marion, Pennsylvania. Only proof of the receipt could have satisfied the allegations of the indictment and the Sixth Amendment requirement relative to vicinage. To satisfy this proof and venue objection, the Court of Appeals for the Seventh Circuit opined "In the normal course of the mails, we presume that a letter is sent to the address shown, so that venue is adequately established." (App. 25) In support of this statement the Court of Appeals relies upon two civil cases of this Court, which did not have the constitutional element involved, but rather

related to the efficacy of notice. We know of no criminal case where the fact presumption above quoted has ever been accorded validity. In every case recited by the Court of Appeals in support of its decision, there has been proof of receipt, albeit, at times, by custom. Here there was no such proof. Count One goes beyond what has now been determined the nadir of sufficiency to sustain the allegations of the indictment, much less the constitutional mandate of the Sixth Amendment that a defendant shall be tried within the "state and district wherein the crime shall have been committed. . . ."

Even more attenuated is the alleged proof of mailing as to Count Eight. As the main opinion states, "The Government concedes that the proof of mailing as to Count Eight is 'possibly the most circumstantial' ". (App. 27) This concerned a letter to one Carl Brown in St. Louis from one Robert B. Meyers of Cleveland, Ohio (neither Brown nor Meyers are alleged as co-conspirators, nor are they co-defendants). This carbon copy from the files of the addressor had a notation at the bottom "cc: Mr. Thomas Joyce." The indictment charged that Joyce had received this at his home address on the South Side of Chicago. One Paterson testified that "the customary procedure was to place such a copy in a separate pile of mail going to Joyce or Globe [Insurance Company] and then to mail the pile in one envelope." Again there was no proof of receipt, and the fact presumption of the Court of Appeals that "a letter is sent to the address shown" doesn't even obtain here, for no address was shown for Joyce. Nor were Global's offices in Joyce's home. Extending the fact presumption detailed in Count One, the Court of Appeals' main opinion determined that "Since the copy was sent to Joyce in Chicago, venue is present." (App. 28) The dissenting Judge could not tolerate this determination finding that

"[The] record will not support a reasonable inference that a copy of the letter was sent to Joyce", and concluding that "The record is barren of any evidence to establish that Joyce ever received a copy of the letter in Chicago", the dissenting Judge could not agree that either mailing or venue is established. (App. 44, 45)

The Trial Judge also could not see that mailing was established, and he acquitted the co-defendants Sheree and Wallace on account of no proof of the use of the mails in regard to that count letter.

Joyce at that time also asked for the same consideration, but the Trial Judge found that the purpose or time of the remand for consideration of post-trial motions as to Joyce had passed, and that he was without jurisdiction to grant the relief. On this point, the dissenting Judge makes a simple but poignant observation:

> "This recitation of facts clearly demonstrates the unfairness to this defendant through an affirmance of Count Eight." (App. 45)

Whatever the permissible limits of viewing evidence in the light most favorable to the Government on appeal, those limits do not tolerate any consideration that a defendant has been treated unfairly, and when that consideration exists, his conviction should not be allowed to stand. We would suggest that it was this abiding conviction that compelled the dissenting Judge to vote for rehearing, on which he was overruled. (App. 47)

As for Count 15, petitioner's co-defendant testified he "in all probability" mailed the Count letter and that he did not hand-deliver it. Clearly showing no personal recollection, and testifying to no usage or course of business, it would seem clear that jurisdictional bases should not be so

casually accepted where they are based clearly on speculation, guess and surmise.

3. In *Kann* v. *United States,* 323 U.S. 88, this Court stated the rule that,

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." (323 U.S. at 95)

It had occasion to reenunciate the rule in *Parr* v. *United States,* 363 U.S. 370, 389.

Though the mailings in the former case were excepted from the effect of the statute because the scheme had been perpetrated beforehand, and in the later because local law required the mailings, yet the purpose of the statute is as effectively diminished here where the letter's furtherance of the scheme can only be reached by tortuous reasoning and strained, tangential relationship. This reduces the mailings under the statute (18 U.S.C. §1341) solely to create a basis for federal jurisdiction (as under 15 U.S.C. §77q) instead of a fundamental element of the crime described. See the cogent distinction between the purposes of the two statutes in the Second Circuit decision in *United States* v. *Cashin,* 281 F. 2d 669, 674.

4. The weakness of the Government's proof under Count I has already been discussed under the evidence and in the next preceding section hereof. However, what does not appear therein is that the basis for the Trial Court denying the motion for judgment of acquittal after verdict, adopted by the United States Court of Appeals for the Seventh Circuit, never became an issue before the post-trial motions, several months after the jury had been dis-

charged and opportunity to defend against the issue expired. The Court of Appeals decision that the "tangential" connection to the scheme of the letter of the Industrial Valley Bank in reply to petitioner's request for duplicate financial statements was, in essence, that the letter was the forerunner of those statements (though no proof was ever adduced that the statements had ever been sent to petitioner), and that a further element of this tangent was that a check had been drawn on the account to American Express. This theory was never suggested by the Government, never argued to the jury, no questions were asked about the check, of its making, of its delivery, or its purpose. Nothing was done to alert this petitioner or his counsel that it would be the standard upon which his jail sentence would rely. Only after trial, and on motion for judgment of acquittal notwithstanding the verdict, was the theory on which conviction now rests evolved. This type of procedure has been condemned by this Court in civil action.

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal

proceedings before administrative agencies entrusted with the responsibility of fact finding." *Hormel* v. *Helvering,* 312 U.S. 552, 556.

To the same effect see *Wagner* v. *Retail Credit Co.,* 7 Cir., 338 F. 2d 598, 601; *Schenfeld* v. *Norton Company,* 10 Cir., 391 F. 2d 420, 424; and *In Re Black Ranches, Inc.,* 8 Cir., 362 F. 2d 19, 32.

5. Count 8 concerns a letter sent by Robert D. Meyer of International Excess Agency, Inc., Cleveland, Ohio, to Mr. Carl Brown, Royal Excess Underwriters, St. Louis, Missouri. It starts out with a recitation that the letter was being sent "with the consent of Mr. Thomas Joyce". It is on the basis of this representation that it is determined that Mr. Thomas Joyce had caused the mailing of the letter. Neither Mr. Meyers nor Mr. Brown was indicted, nor named as an unindicted co-conspirator. Neither Mr. Meyers nor Mr. Brown were called as witnesses. Mr. Meyers' superior, one Mr. Paterson, was the only witness. The majority opinion stated:

"This, of course, fu[illegible]hered the scheme." (App. 27)

Chief Judge Swygert dissenting, however, was somewhat more perceptive, recognizing that the witness did not write the letter, didn't know if he was in the office when the letter was written, and in fact, knew nothing of the writing of the letter. (App. 44) Yet the recitation of the count letter that it had been sent "with the consent of Mr. Thomas Joyce" is the basis of the causing of the mails to be used. Mr. Meyers was not available for cross examination on his recitation in the letter that the letter was sent with Mr. Joyce's consent. No one was available to determine whether that supposed consent was valid. Clearly this is a deprivation of the Sixth Amendment right of cross examination.

6. The indictment defining the scheme charged that the defendants in this case did cause Trust No. 15385, an Illinois Land Trust, to be entered into between Global and the Cosmopolitan National Bank of Chicago. The Court of Appeals also found that the defendants represented that the Trust was established to protect the United States and Canadian policyholders of Global. The count 10 letter is an inquiry by Carvalho and Company, Inc., which represented itself as a correspondent of the Global Surplus & Excess Ltd. and its largest producer of premiums. Its inquiry was that they "would be very interested in learning what the status is of the trust in caption [Trust No. 15385]." In other words, the author of the letter directed to the land trustee was checking on the alleged representations made to him. It is not suggested that Cosmopolitan was in any manner instructed to—nor would it as a National Bank—misinform as to the provisions of the trust. If the allegations of the indictment are credited, a positive response would disclose wherein those representations were false. Clearly this could not be in execution of the scheme. Thus, the successful completion of the mailings . . . increased the probability that [petitioner] would be detected and apprehended." (*United States* v. *Maze*, 94 S.Ct. 645, 650). The letter here is obviously not in furtherance of the scheme and the determination that it is is contrary to this Court's said opinion.

Some recognition is shown of this in the Court's decision as follows:

> "While inquiries to Cosmopolitan were aimed at detecting any fraud which might exist, it was necessary to permit such inquiries to persuade some victims that the trust was as represented." (App. 32)

The Court's mere statement demonstrates that the mailings are not in furtherance of the fraud.

7. We can do no better than to repeat what the Chief Judge (who however did not dissent from the affirmance of these two counts) said in relation to them reflecting a nagging uneasiness about them:

> "The foregoing observation is equally applicable to Counts 10 and 11 where the count letter in Count 10 becomes the underlying basis for Count 11 since the latter count dealt with merely a forwarding of a photostatic copy of the Count 10 letter from the original addressee, Cosmopolitan National Bank, to Global. If the copy of the original letter had been forwarded several times through the mail, presumably the Government would have been able to indict for each separate mailing. It seems to me the prosecutor has a responsibility to exercise restraint and should not approve indictments on essentially irrelevant or duplicative mailings in order to increase the number of counts." (App. 46)

It is significant that the majority was compelled to agree. (App. 41)

Conclusion

Wherefore, this Petitioner respectfully prays the Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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